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No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Amicus Curiae, Cherokee Nation, prays that the Petition of the Oklahoma Tax Commission for a Writ of Certiorari for review of the judgment of the Tenth Circuit Court of Appeals, entered in this case on July 29, 1994, be denied.

THE INTEREST OF THE AMICUS CURIAE CHEROKEE NATION

The Cherokee Nation submits this brief, with accompanying consents of the parties, as Amicus Curiae under U.S. Sup. Ct. Rule 36. The Cherokee Nation limits its submission to arguments in support of the Tenth Circuit's decision concerning the Oklahoma state fuel tax.[1]

The Cherokee Nation has an interest in this action insofar as it concerns the state fuel tax issue for several reasons. First, the Cherokee Nation shares a similar legal history with the Chickasaw Nation, being one of the five federally recognized tribes formerly referred to as the "Five Civilized Tribes." It accordingly has a strong interest in participating in any major decision which could subsequently directly or indirectly affect interpretation of the legal status of these tribes arising from their common history.

Second, the Cherokee Nation functions as a strong governmental entity for a significantly large membership, consisting of 163,740 members, 116,854 of whom reside in Oklahoma. Its exercise of governmental powers includes maintenance of a Tax Commission and the recent establishment of a Roads and Transportation Program. The

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[1] The Cherokee Nation does not address the Tenth Circuit's interpretation of this Court's decision in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S. Ct. 1988 (1993), as allowing a state income tax exemption to tribally employed members who do not reside in Indian country, since the Tenth Circuit decision is based on special provisions in treaties of only a very few tribes in the United States and therefore obviously warrants no Supreme Court review on a petition for certiorari.

Cherokee Nation has an interest in protecting its ability to fully exercise these important governmental functions.

Third the Cherokee Nation has jurisdiction over approximately 61,300 acres of tribal trust property and 56,000 acres of restricted property in northeastern Oklahoma. Although the Cherokee Nation does not presently operate any gas retail business, it has an interest in protecting its ability to establish such a business at a future date, not only for economic development purposes, but also to establish a source of revenue from a tribal tax on gasoline purchases by the Cherokee Nation. A portion of this tribal revenue may be made available for construction and maintenance of roads in the Cherokee Nation's jurisdictional area to assist rural Indians and non-Indians whose needs are not currently adequately met by the state or county roads systems.

SUMMARY OF ARGUMENT

Amicus Curiae Cherokee Nation's argument in opposition to the Oklahoma Tax Commission's Petition for Certiorari is simple. The Tax Commission's claims that the Tenth Circuit decision is confusing and burdensome on the states are unfounded and irrelevant to a decision whether United States Supreme Court review is needed in this action. The Tenth Circuit held that the legal incidence of the challenged state fuel tax falls on the tribe and that state taxation of the tribe is preempted absent express Congressional authorization. This holding is consistent with the United States Supreme Court's decisions establishing basic principles governing federal, tribal and

state authority in Indian country. Supreme Court review is not warranted in this case.

ARGUMENT

The Oklahoma Tax Commission has not demonstrated the existence of any "special and important reasons" for Supreme Court review of the Tenth Circuit decision. It has not and cannot show that the decision is in conflict with the decision of another federal appeals court on the same matter or that it has decided a federal question in conflict with a state court of last resort. See U. S. Sup. Ct. Rule 17. The Tax Commission also has not established that this case meets any other standard for determining whether a case should be reviewed on certiorari, failing to show that the decision has "so far departed from the accepted and usual course of judicial proceedings" as to justify "an exercise of this Court's power of supervision." See U.S. Sup. Ct. Rule 17.1(a).

The Tax Commission argues that certiorari should be granted based on its assertion that the Tenth Circuit decision imposes "a significant burden on the States" by diminishing state power to raise revenue for construction and maintenance of state roads outside of Indian country, which are used by both Indians and non-Indians, and based on its assertion that the decision sows "considerable confusion" in a complex area of the law. Pet. at 2, 8. The Tax Commission also argues that the rule against direct taxation of a tribe's reservation activities established in *McClanahan v. Arizona Tax Commission*, 416 U.S.

164 (1973), has never been stated in absolute terms, Pet. at 9, asserting that:

> . . . this rule has never been applied to invalidate a state tax in the circumstances here: where the economic burden of the tax falls . . . on purchasers who are non-Indians or non-members of the Tribe; where the State undeniably could impose the tax directly on those purchasers – and could . . . require the Tribe to collect and remit the tax; and where use of the product sold generates costs that are imposed entirely upon the State.

The Tax Commission claims that the Tenth Circuit decision departs from "this Court's precedents in the placement of the legal incidence of the challenged tax," Pet. at 8, without providing any convincing legal documentation. The Tax Commission does not present any contrary caselaw directly in point, relying instead on loose interpretations of dictum in other cases with regard to the ability of states to impose taxes on non-Indian consumers purchasing goods in Indian country. Pet. at 13, citing *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 482 (1976) and *Confederated Tribes of the Colville Indian Reservation v. State of Washington,* 447 U. S. 134, 178.

The Tax Commission's statements concerning the "nature of the fuel tax," Pet. at 8 and 9, are also legally and factually inaccurate. The Tenth Circuit's evaluation of the tax as a tax on the tribe, rather than a sales tax on the consumer, is based on a comprehensive review of all provisions of the state's fuel tax laws, including provisions requiring distributors to remit the taxes and provisions stating that remittances are made "on behalf of a

licensed retailer." Cf. Okla. Stat. Ann. Tit. 68, § 502 (Supp. 1993). As stated by the Tenth Circuit, citing *White Mountain Apache v. Bracker,* 448 U.S. 136, 151, n. 15 (1980), and *Memphis Bank & Trust Co. v. Garner,* 459 U.S. 392, 397 (1983): "The question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed." *Oklahoma Tax Commission v. Chickasaw Nation,* 31 F.3d 964 (10th Cir. 1994) Resp. Brf. Appendix A at 14a.

Since the Oklahoma fuel tax is clearly a tax on the retailer tribe in the instant case, the Tax Commission attempts to confuse the issues by playing for this Court's sympathy in its characterization of the "nature" of the tax. The Tax Commission states that "perhaps most significant," the state fuel tax revenues are used to defray costs of road construction and maintenance "imposed upon the *State* – and *only* upon the State" by the use of the fuel.

The Tenth Circuit correctly found any consideration regarding use of the tax irrelevant in its evaluation of the nature of the tax as follows:

> . . . Here, the proceeds of the fuel tax go almost exclusively to the building and maintaining of highways in the state of Oklahoma, both within Indian country and without. This fact does not alter the nature of the fuel taxes as simple revenue measures. Because they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal government. Accordingly, the district court erred in concluding that imposition of the fuel tax on the tribal retailer was not preempted by federal law. Where the state action conflicts

> with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary. *Rice*, 463 U. S. at 719-20. The state has directed our attention to no such explicit grant of congressional approval of the taxation scheme here at issue and we know of none.

Oklahoma Tax Commission v. Chickasaw Nation, 31 F.3d 964 (10th Cir. 1994), Resp. Brf. App. at 16a.

Based on the above reasoning, the Tenth Circuit correctly found that a "balancing of the respective tribal and state interests at stake is not relevant to a determination of the propriety of the fuel taxes." *Oklahoma Tax Commission v. Chickasaw Nation*, 31 F.3d 964 (10th Cir. 1994), Resp. Brf. App. A at 16a.[2] Although this finding is well grounded in basic Indian law principles set out in cases

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[2] Although the Tenth Circuit refers to a "presumption" of tax exemption for Indian tribes, the rule could be more accurately characterized as a "per se" rule, in light of statements by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n. 17 (1987) that: "In the special area of state taxation of Indian tribes . . . we have adopted a per se rule . . . and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear . . . " It should be stressed here that state taxation is not the same thing as state regulation. See *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that the applicability of a Public Law 280 state's civil laws in Indian country by virtue of Public Law 280 did not result in express Congressional consent to tax on reservation activities). Under the per se rule, state taxation is not permissible absent Congressional consent, while state regulation may be allowed when state and tribal interests are balanced under the infringement test.

such as *McClanahan v. Arizona Tax Commission*, 416 U.S. 164 (1976), *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Amicus Curiae Cherokee Nation believes it is important to nevertheless inform this Court that the Tax Commission has incorrectly stated that it bears the full economic burden of the use of roads by consumers of gasoline sold by an Indian tribe. In the 1994 fiscal year, more than $ 17.5 million in federal Indian Reservation Roads funds were allocated to the Bureau of Indian Affairs and/or Indian nations in Oklahoma for roads projects pursuant to 23 U.S.C. 202(d).[3] The Indian Reservation Roads funding supplements federal funding which the state receives for highway construction and maintenance. 23 U.S.C. § 204(c).[4] This funding is used for public

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[3] The Cherokee Nation alone had federal Indian Reservation Roads funding in the amount of more than $ 4 million for its 1994 fiscal year for its roads program, administered by its Transportation and Roads Program as authorized by a compact between the Nation and the federal government. "Addendum to FY 1994 Annual Funding Agreement Between Cherokee Nation and the United States (Department of Interior)" executed pursuant to the Indian Self-Determination Act, 25 U.S.C. 450f. Prior to the administration of this funding by the Nation, federal roads funding for the fourteen county area within the geographic boundaries of the Cherokee Nation was administered by the Bureau of Indian Affairs. Indian Reservation Roads funding benefits both Indians and non-Indians. On a national scale, the Federal Highway Administration had $ 191 million allocated for the Indian Reservation Roads Program in FY 1994.

[4] The Federal Highway Administration approves projects for federally funded secondary road systems proposed by state departments of transportation. Federal taxes pay a large percentage of the costs of construction, and local government pays the remaining costs. In states with substantial amounts of

roads located within or leading to Indian country or an Indian community, traveled by non-Indians and Indians alike.[5] Even in areas of high Indian populations, the population in any given geographic area in Oklahoma is still predominantly non-Indian.

In summary, the state's reliance on the "burden" of the Tenth Circuit's decision as a reason for this Court's review of the case is outside the scope of the preemption principles governing this action. The Oklahoma fuel tax is a direct tax on the tribal retailer which is preempted by federal law. It is directed toward funding traditional government activities which fall within the ambit of the sovereignty of the tribal government. Several tribal governments in Oklahoma, including the Cherokee Nation,

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Indian and/or federal land, the federal share is greater and the local share is smaller. In Oklahoma, the federal share in 1986 was almost seventy-six percent. See "Report to Bureau of Indian Affairs, BIA Transportation Study, State of Oklahoma," Report Summary, General Report Vol. GR-I at IV-7, Presnell Associates, Inc., September 1986.

[5] In contrast, a 1986 report included findings that the state and counties constructed and maintained roads with federal funds in a significantly smaller percentage of those Oklahoma counties with a greater Indian population, compared to road construction and maintenance in those Oklahoma counties with smaller Indian populations. The report questioned the disparity and suggested the possibility of discrimination by the state against Indians in use of the federal funds. See "Report to Bureau of Indian Affairs: BIA Transportation Study, State of Oklahoma," Report Summary, General Report, Vol. GR-I at IV-19 and IV-22, Presnell Associates, Inc., September 1986.

have recognized this fact by pursuing enactment of tribal fuel tax legislation.[6]

CONCLUSION

The Oklahoma Tax Commission has failed to present sufficient grounds for issuance of a writ of certiorari. The Tenth Circuit decision did not resolve any substantial federal question. Rather it represents a narrow holding that, under the State of Oklahoma's current statutory scheme, the Chickasaw Nation is not subject to payment of the state tax on gasoline purchased by the tribe for retail sales in Indian country. In view of the lack of precedential effect of this case on Indian tribes outside of Oklahoma and in view of the consistency of the opinion with the decisions of this Court setting forth principles concerning state taxation in Indian country, Amicus

[6] The Chickasaw Nation, Choctaw Nation and Seminole Nation have each adopted tribal laws which impose tribal taxes replacing the state fuel tax. Chickasaw Nation Law 11-011 (August 11, 1994), Choctaw Nation Bill 163-94 (August 13, 1994) and Seminole Law 94-13 (September 3, 1994). The Council of the Cherokee Nation currently has such legislation before it for consideration for passage in December of 1994.

Curiae Cherokee Nation requests the Court to deny the Petition for Certiorari.

Respectfully submitted,

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